

**Florida's Request To Assume Administration of a Clean Water Act Section 404 Program
(85 FR 57853, September 16, 2020) EPA-HQ-OW-2018-0640**

Code 7 Tribal Consultation

Level of consultation will increase with Assumption of Section 404

One commenter (0223) provided assurance that historic and cultural resources in the state will be protected if Florida takes over the Section 404 program. The commenter explained that FDEP has an agreement with the State Historic Preservation Officer (SHPO) that outlines the “historic properties review,” which assesses potential effects on historic properties from pending Section 404 permit applications. The commenter pointed out that the state also has regulations to ensure all activities, including Section 404 permitting, require a “no effect” or “no adverse effect” determination by the SHPO before a permit is authorized, and immediate ceasing of work and consultation if unanticipated discoveries are made during construction. The commenter also described a commitment from FDEP to work with Florida’s Tribes, and stated that the level of consultation described here provides greater participation in the review of applications than Tribes currently have. The Tribes also will have the ability to inform and add to any Requests for Additional information in the permit approval process and provide public comments during the comment period. The commenter also explained that the Operating Agreement further provides the Tribes with the opportunity to offer effects determinations, participate in the resolution of adverse effects, and request federal review in the event of disagreements with FDEP and/or the SHPO.

Another commenter (0429-Justin Wolfe) reiterated that the FDEP is committed to working together with Florida's tribes, as demonstrated by the cooperative engagement with the Seminole Tribe of Florida and the Miccosukee Tribe of Florida.

In contrast, another commenter (0386-A1) considered a fundamental flaw of the FDEP’s proposal to be the risk that Tribes will lose consultation rights and protections for impacts to adjacent lands.

Request for meaningful consultation

One commenter (0349) expressed concern that the Muscogee (Creek) Nation was not consulted earlier in the rulemaking process. The commenter notes that the Muscogee (Creek) Nation did not know about the proposed Florida Assumption until a meeting with EPA on October 15, 2020. The commenter asserts that the Nation should have been consulted earlier in the process, similar to consultation with other Florida tribes. The commenter referenced Florida’s State 404 Program Description (EPA-HQ-OW-2018-0640), which says, “Additionally, the Department has been working with EPA, the State Historic Preservation Office, and Indian Tribes in Florida to ensure that the outcomes of the state’s process for protection of historical and cultural resources are at least as protective as those under the federal process.” The commenter requested meaningful consultation between the Muscogee (Creek) Nation and the EPA.

Coordination of dispute resolution

Another commenter (0431) expressed concern that the process for dispute resolution between EPA, FDEP, and the Seminole Tribe is still not clear regarding non-waivable categories, Indian Country determinations, and effects to cultural resources, and endangered species. The commenter explained that EPA has confirmed its commitment to Nation communications on these categories and agreed to provide flexible coordination with the Seminole Tribe, however, the process has not been developed. The commenter requested that the coordination between EPA and the Seminole Tribe occur before a dispute can arise.